

MALAYSIAN REPORTS**K.M.I. BASHEER AHMAD & ANOR. v.
RAHMAT BIN SHWALL**[F.C. (Suffian L.P., Raja Azlan Shah and
Wan Suleiman F.J.J.) March 15, 1977]

[Kuala Lumpur — Federal Court Civil Appeal No. 107 of 1976]

Tort — Negligence — General damages for injuries suffered by plaintiff — Loss of future earnings — Assessment by trial judge — Not inordinately excessive in light of cases.

In this case a motor cycle ridden by the respondent collided with a motor car driven by the first appellant and owned by the second. The appellants had admitted liability and the only issue was as to quantum. The appellants appealed against the award of \$15,000 for general damages in respect of injuries and the award of \$24,000 for loss of future earnings. It was argued (a) that the award for general damages was too high as the respondent had ignored medical advice and also because the award was higher than the usual level; (b) that the award for loss of earnings was too high and the award should be for \$12,000 only as the respondent could do light work after the accident.

Held, dismissing the appeal: the learned trial judge had not acted on wrong principles of law nor misapprehended the facts nor made a wholly erroneous estimate of the damage suffered. The quantum of damages awarded was not inordinately excessive in the light of the cases.

Cases referred to:-

- (1) *McAuley v. London Transport Executive* [1957] 2 Lloyd's Rep. 500.
- (2) *Kim Ju Kiang v. Loh Kai Mee*, K.S. Dass, Quantum in Accident Claims, p. 573.
- (3) *Maya binte Hashim v. Nadarajah s/o Thangavaloo* [1971] 1 M.L.J. xxx.
- (4) *Yew Chek Hwa v. Matthews* [1970] 1 M.L.J. xvi.
- (5) *Jones v. Griffith Bingham* 7th Ed. p. 558.
- (6) *Ti Tuck v. Mohamed Yusof* [1973] 2 M.L.J. 62.
- (7) *Khoos See Moi v. Tay Teik Chang* [1970] 2 M.L.J. 249.

FEDERAL COURT.

Y.M. Chin for the appellants.

G.T.S. Sidhu for the respondent.

In the court below, *Inderjit Singh* appearing for the plaintiff and Y.M. Chin for the defendants, the following judgment was delivered on July 8, 1976:

Mohamed Zahir J.: The Plaintiff sued the Defendants for damages arising from a motor accident involving his motor-cycle and the car driven by the 1st Defendant, a servant of the 2nd Defendant at 11½ milestone, Kuala Selangor/Kuala Lumpur road on November 4, 1970.

Liability was admitted by the defendants and the question to be decided now is the quantum. The injuries caused to the plaintiff were also admitted and the earning of the plaintiff was also admitted as at \$240 per month and special damages other than loss of earning at \$550.

The plaintiff suffered from the following injuries:—

- (1) Small laceration right side on the chin.
- (2) Puncture wound upper 1/3rd medial side of left leg.
- (3) Swelling right leg.

X-rays showed:

- (1) Comminuted fracture upper 1/3rd left tibia and fibula.

- A (2) Comminuted fracture lower 1/3rd right tibia and fibula.

X-ray skull no fracture seen.

The patient left the ward on January 7, 1971 against medical advice.

- B According to the medical report dated October 26, 1973, the plaintiff used a walking stick in the right hand to relieve weight on the left leg and walked with a pronounced limp. The right leg showed evidence of a united fracture of the tibia at the junction of the middle and lower thirds. At the site there was a bony lump. Movements of the right ankle and foot were restricted to about two-thirds the normal range. The left leg was bent at its upper third. The fracture of the tibia had healed with the lower fragment tilted backwards and laterally. The left leg was 1 inch shorter than the right. Because of the bend the leg could not be straightened in line with the thigh although movements at the knee were of normal range. At the left ankle and foot movements were limited to half the normal range.

- C
- D The opinion of the doctor was that the shortening and deformity of the left leg above resulted from a fracture. They would be permanent. The restriction of movements noted at the ankles and feet was also likely to be permanent. He is permanently incapacitated from work involving movements requiring a good range at the ankle such as climbing and squatting or work involving carrying heavy loads or much walking.

- E Another medical report by the same doctor dated January 20, 1976 was produced in which it was further stated that X-rays taken on January 7, 1976 confirmed that the fractures of the upper thirds of the left tibia and fibula had united with overlapping of the fragments and tilting of the lower fragment about 30° backwards, and the opinion of the doctor was that the disabilities noted in his previous report had remained and would remain permanent.

- F This doctor was called as a witness by the plaintiff and he further testified that there was considerable restriction to the movement of the ankles of the plaintiff and this gave rise to osteoarthritis. As to the fact that the plaintiff left the hospital against medical advice, the doctor stated that the plaintiff had been in the hospital for two months and this length of time would usually make the fractures fairly stable and even if the plaintiff were to leave beyond this time, the effect would be negligible. Further the doctor stated the plaintiff although had himself discharged continued with the treatment as an outpatient for a further period of 6 months. The outpatient cards were produced by the plaintiff, which were admitted by the defence.

- G The defence counsel in seeking to reduce the quantum on account of the plaintiff having discharged himself out of the hospital against medical advice, examined the doctor who testified that he (the doctor) would not be able to testify definitely that the fractures would be set if the plaintiff would be down in the hospital bed. He further testified in answer to cross-examination that if the operation was done early, up to a period of 3 weeks, it was possible to correct the

shortening and also it would be possible to correct the deformities.

The defence counsel in his submission suggested that the damages be reduced on account of the plaintiff having obtained himself a discharge from the hospital against medical advice and he quoted the case of *McAuley v. London Transport Executive*.⁽¹⁾ He also submitted that the plaintiff had failed to call the doctor against whose advice the plaintiff got his discharge from the hospital to give evidence and on this ground he asked the court to give an unfavourable inference against the plaintiff.

With due respect I cannot agree with the defence counsel with this submission on the ground that as testified by the doctor called by the plaintiff the fractures on the plaintiff could not be corrected even if he had stayed longer in the hospital. The doctor stated that a period of two months was the usual length of time that would make the fractures fairly stable. According to the doctor if the operation was done early, say after 3 weeks, it would be possible to correct the deformities. However, the plaintiff was in the hospital for more than 2 months and if there was any medical error or mistake it was not caused by him since he was admitted immediately after the accident. It would be different if there was a medical opinion to the effect that had the plaintiff continued treatment in the hospital for more than two months his injuries would be healed. But this was not the case.

Further, in the case which was quoted by the defence counsel above, the plaintiff disregarded the advice of the doctor who advised the plaintiff to have an operation. The plaintiff there refused to have the operation and this refusal was considered unreasonable. In the instant case I am of the opinion that the refusal by the plaintiff to continue staying in the hospital could not be unreasonable because even if he were to continue staying, the treatment, as testified by the doctor, would be negligible and further, as admitted by the defendant, it was disclosed that the plaintiff continued to be treated as an outpatient throughout a period of 6 months after he was discharged and that his legs were in plaster for a period of 6 to 8 months.

As regards the other point that it is incumbent for the plaintiff to call the doctor whose advice was ignored as witness, I do not think that this is the law. The plaintiff had called another doctor to testify for him on this point. This evidence was not challenged by the defence and there was nothing to show that this doctor was not competent to give such evidence. The defendant could have called the other doctor if he so desired but he had failed to do so. I, therefore, will hold that the plaintiff's refusal to stay in hospital has not, in any manner, reduced the liability on the part of the defendant.

The defence counsel suggested that for the injuries to the plaintiff as regards $\frac{1}{2}$ inch laceration, 1 inch shortening of the left leg and the lack of 5° movement a sum of \$8,000 be awarded. He quoted the case of *Kim Ju Kiang v. Loh Kai Mee*⁽²⁾ where the plaintiff was awarded a sum of \$8,000. However, the case referred to by him was that the plaintiff there suffered only compound fractures of the left tibia and fibula

whereas in the instant case the plaintiff suffered comminuted fracture of both left and right tibia and fibula. That case occurred in 1970. The plaintiff's counsel also quoted *Maya binte Hashim v. Nadarajah s/o Thangavaloo*⁽³⁾ where a sum of \$15,000 was awarded and *Yew Chek Hwa v. Mathews*⁽⁴⁾ where a sum of \$12,000 was awarded. He suggested a figure of \$15,000 to \$18,000. I shall allow the plaintiff a sum of \$15,000 for this.

As regards loss of future earnings, the defence counsel suggested 20 years purchase at \$120 and the amount would come to a sum of \$17,395.70. The defence counsel did not make any suggestion with regard to actual loss of earnings after the accident. The plaintiff's counsel in the submission as regards the loss of future earnings also suggested a period of 20 years purchase but at a figure of \$220 per month.

I think \$220 per month is rather on high side considering the plaintiff would be getting a lump sum and further he is not wholly incapable of doing any other job, fishing for instance, and there is evidence he is still doing some fishing. He can still continue to do light work although he could not carry heavy loads and considering the average earning of the plaintiff before the accident was \$191.98 I would consider \$160 per month would be a fair figure at 20 years purchase and this will come to a sum of \$23,923.20 and I shall award the sum of \$24,000 being the round figure.

The parties had agreed \$550 being the special damages on transport expenses and nourishing food.

As regards the actual loss of salary, I would give him a period of one year, that is the period after the accident, 8 months when his legs were in plaster and a further 4 months recuperating period at the agreed rate of \$240 per month and that will come to \$2,880. From this figure should be deducted a sum of \$1,899.76 which was paid by the employer to the plaintiff, leaving the balance of \$980.24.

I, therefore, order the defendants to pay the plaintiff as follows:—

- (a) General damages \$39,980.
- (b) \$550 special damages.
- (c) Costs.
- (d) Interest at the rate of 6% on \$15,000 on pains and suffering and loss of amenities and 3% on \$550 with effect from the service of the writ.

The defendants appealed against the above judgment to the Federal Court. The judgment of the Federal Court was delivered by:

Suffian L.P. (read by Wan Suleiman F.J.): On November 4, 1970, a motorcycle ridden by the plaintiff collided at the 11½ m.s. Kuala Selangor-Kuala Lumpur road with a motor car driven by the first defendant and owned by the second.

The defendants admitted liability and the only issue before the court was quantum. After hearing evidence the learned trial judge determined the quantum. The defendants appeal only against the following awards:

- (a) general damages in respect of injuries suffered by the plaintiff \$15,000

(b) in respect of loss of future earnings \$24,000.

As regards (a) the learned judge said:

"The Defence Counsel suggested that for the injuries to the Plaintiff as regards $\frac{1}{2}$ inch laceration, 1 inch shortening of the left leg and the lack of 5" movement a sum of \$8,000/- be awarded. He quoted the case of *Kim Ju Kiang v. Loh Kai Mee*⁽²⁾ where the plaintiff was awarded a sum of \$8,000/-. However, the case referred to by him was that the plaintiff there suffered only compound fractures of the leg tibia and fibula whereas in the instant case the plaintiff suffered comminuted fracture of both left and right tibia and fibula. That case occurred in 1970. The plaintiff's counsel also quoted *Maya binte Hashim v. Nadarajah s/o Thangavaloo*⁽³⁾ where a sum of \$15,000/- was awarded and *Yew Chek Hwa v. Mathews*⁽⁴⁾ where a sum of \$12,000/- was awarded. He suggested a figure of \$15,000/- to \$18,000/-. I shall allow the plaintiff a sum of \$15,000/- for this."

Before us Mr. Chin referred us to *Kim Ju Kiang*⁽²⁾ mentioned by the trial judge, and also to *Yew Chek Hwa v. Mathews*,⁽⁴⁾ *Jones v. Griffith*⁽⁵⁾ mentioned by Bingham, 7th edition, at page 558, and to *McAuley v. London Transport Executive*⁽¹⁾ and to McGregor on Damages, 13th edition, para. 87. He stressed that the plaintiff had ignored medical advice. He also said that the plaintiff had failed to produce an X-ray. He submitted that the present award is about 25% more than the usual level and that in view of all this, at the most the plaintiff should have been awarded only about \$12,000 being:—

- (a) \$8,000 for the shortening of the leg; and
- (b) \$4,000 for the injury to both limbs.

As regards (b), the learned judge said:—

"As regards loss of future earnings, the Defence Counsel suggested 20 years purchase at \$120 and the amount would come to a sum of \$17,395.70. The Defence Counsel did not make any suggestion with regard to actual loss of earnings after the accident. The Plaintiff's Counsel in the submission as regards the loss of future earnings also suggested a period of 20 years purchase but at a figure of \$220 per month.

I think \$220 per month is rather on high side considering the plaintiff would be getting a lump sum and further he is not wholly incapable of doing any other job, fishing for instance, and there is evidence he is still doing some fishing. He can still continue to do light work although he could not carry heavy loads and considering the average earning of the plaintiff before the accident was \$191.98, I would consider \$160 per month would be a fair figure at 20 years purchase and this will come to a sum of \$23,923.20 and I shall award the sum of \$24,000 being the round figure."

Before us Mr. Chin submitted that at the most the plaintiff should get only about \$12,000, as he can do light work, and he drew our attention to *Ti Huck v. Mohamed Yusof*,⁽⁵⁾ *Khoo See Moi*⁽⁶⁾ and to paragraphs 1,113 and 1,114 in *MacGregor*.

We have looked up the authorities and carefully considered Mr. Chin's submission and are of the opinion that the learned judge has not acted on a wrong principle of law, nor misapprehended the facts nor made a wholly erroneous estimate of the damage suffered. In our view the quantum is not inordinately excessive in the light of the cases, and so we dismiss this appeal, with costs.

The appellants' deposit to be paid to the respondent against his taxed costs.

Appeal dismissed.

Solicitors: *Allen & Gledhill; Khoo & Sidhu.*

N.T.S. ARUMUGAM PILLAI v. GOVERNMENT OF MALAYSIA

[F.C. (Suffian L.P., Ong Hock Sim and
Wan Suleiman F.J.) March 15, 1977]

[Kuala Lumpur—Federal Court Civil Appeal No. 155 of 1976]

Practice and Procedure — Execution — Writ of Seizure and Sale — Auction sale — Conduct of.

This was an appeal from the dismissal by the High Court of an application to set aside the auction sale held pursuant to a writ of seizure and sale of land belonging to the appellant and at which the land was sold to the Kedah State Development Corp. It was argued on the appeal (a) that the learned judge erred in failing to hold that the Kedah State Development Corporation was indistinct from the plaintiff, the Government of Malaysia and therefore not entitled to bid at the sale without leave of the court (b) that because of the serious allegations made regarding the sale, the sale should be set aside as being unfair and unjust.

Held, dismissing the appeal: (1) the Kedah State Development Corporation was established under the Kedah State Development Corporation Enactment, 1965, and could not by any stretch of imagination be equated with the Government of Malaysia;

(2) there was no evidence in this case of malpractice or non-compliance with established practice in the conduct of auction sales.

FEDERAL COURT.

A. Jayadeva (K. Chandra with him) for the appellant.

Abdul Rashid bin Abdul Manaf (Jaafar Mohamed Saman with him) for the respondent.

Ooi Gin Sun for the Kedah State Development Corporation.

Ong Hock Sim F.J. (delivering the judgment of the Court): This appeal is from a dismissal by the High Court, Penang, of an application to set aside the auction sale held at the Key Sales Room, No. 13, Church Street, Penang on September 30, 1976, pursuant to a Writ of Seizure and Sale, of the United Patani Estate, Sungei Patani belonging to the appellant, to the Kedah State Development Corporation (hereinafter referred to as the "Corporation").

The main ground of complaint is that the learned judge erred in failing to hold that the Corporation was indistinct from the plaintiff, the Government of Malaysia and therefore not entitled to bid at the sale without leave of the court. We do not think there is merit in this ground, as the Kedah State Development Corporation Enactment, 1965, established the Corporation as a legal entity which cannot by any stretch of imagination be equated with the Government of Malaysia.

Counsel for the appellant urged that an adverse inference should be drawn from the presence of public officers at the auction that intending purchasers were intimidated from bidding. Here perhaps we should quote some parts of the judgment:—

"The brief history of the matter is that the plaintiff having obtained judgment against the defendant for income tax owing to the plaintiff executed the judgment by attaching the defendant's property known as United Patani Estate in Kedah by a Writ of Seizure and Sale. The said lands were then ordered to be sold by public tender on August 9, 1976. The reserve price was fixed at \$30,000,000 but although the sale was advertised, only three tenders were received and the highest of them was \$9,000,000. The sale thus being abortive, a sale by public auction was ordered and the reserve price was fixed at \$15,000,000.

The auction accordingly took place. The Kedah State Development Corporation bid \$15,000,000 for the said property